In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-49

RAYMOND R. SULLIVAN, ET AL., PETITIONERS

v.

CLAUDE S. BRINEGAR, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals abused its discretion in denying an injunction pending review of a district court decision which found respondents in compliance with the requirements of the National Environmental Policy Act. They also apparently seek review of the district court opinion before judgment in the court of appeals.

Petitioners challenge the continuation, without a NEPA impact statement, of construction of a segment of Interstate Highway 5 (I-5), a Federal Aid Highway running from the Canadian to the Mexican borders through the States of Washington, Oregon,

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and California.[1] After a hearing on petitioners' motion for a preliminary injunction,[2] the district court entered a "Memorandum re Proposed Decision" on January 29, 1973, concluding that petitioners were barred from relief by laches, and, in any event, that respondents had complied with the National Environmental Policy Act (App. A, *infra*). Findings of Fact and Conclusions of Law in accordance with the memorandum were filed on February 14, 1973 (App. B, *infra*), when the district court's judgment was entered (Pet. App. A(1)). The court of appeals denied, without opinion, petitioners' motion for an injunction pending appeal (Pet. App. A(2)). The case is currently pending on appeal in the Ninth Circuit Court of Appeals.[3]

1. Petitioners seek review in this Court of the denial of their motion for injunction pending appeal. As petitioners correctly note (Pet. 14), the only question which the Court could properly consider at this stage of the proceedings is whether the court of appeals

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[1] The segment of highway involved is the last 40 mile stretch of the otherwise completed 1,382 mile highway. The district court's findings of fact describe in detail the public procedures followed between 1958 and 1969 in connection with the adoption of the present route for this segment, the consideration given to environmental factors in selecting the route, and the substantial progress toward construction made before NEPA became effective in 1970 (App. B, *infra*, pp. 9, 12–15).

[2] The City of Sacramento's complaint sought only declaratory relief, not an injunction (App. A, *infra*, p. 6).

[3] Petitioners' brief in the court of appeals was due for filing on July 30, 1973. It has not yet been filed, and no extension of time has been granted.

abused its discretion in denying the preliminary injunction. It is well settled that the award of an interlocutory injunction is not strictly a matter of right, but instead "the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Yakus* v. *United States*, 321 U.S. 414, 440 (citations omitted). In view of the very substantial injury respondents would suffer from any delay in construction (App. B, *infra*, pp. 19–21), and the petitioners' long delay in bringing the suit (which the district court found gave rise to the defense of laches), the court of appeals appropriately exercised its discretion to deny the interlocutory injunction petitioners sought. Petitioners allege no new factors in their petition which would justify overturning the decision below.[4]

2. If petitioners are seeking review in this court of the decision of the district court, they have failed to show that the case involves issues of "imperative public importance" which "justify the deviation from normal appellate processes and * * * require immediate settlement in this court" as required by Rule 20 of the Rules of this Court. The issues involved here—

[4] Petitioners apparently contend that they are entitled to an injunction pending appeal because NEPA requires the filing of an impact statement for the I–5 construction. This contention overlooks the interpretation of the retroactive effect of NEPA contained in the Council on Environmental Quality Guidelines, Section 11, 36 Fed. Reg. 7727, and the conclusion of the district court that respondents had complied with NEPA. In any event, the issue whether respondents complied with NEPA is now before the court of appeals.

whether respondents have complied with NEPA in the construction of I–5, and whether petitioners are barred by laches from challenging respondents' actions—are, in fact, ones which are peculiarly dependent upon the facts of this particular case. They thus may not merit review by this Court even after decision by the court of appeals.[5] In any event, there is no occasion for this Court to consider them without the benefit of appellate court consideration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[5] Petitioners seem to contend that there are conflicts among the circuits concerning the retroactive effect of NEPA and the applicability of laches in cases involving NEPA. The differing conclusions reached are instead, we submit, the result of the various factual situations involved. In any event, such conflicts if they existed would not be sufficient justification under Rule 20 for review by this Court at this stage of the proceedings.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

RAYMOND R. SULLIVAN, ET AL.,
PLAINTIFFS,

v.

JOHN A. VOLPE, ET AL.,
DEFENDANTS,

CITY OF SACRAMENTO, A MUNICIPAL CORPORATION,
PLAINTIFF IN INTERVENTION,

GRANITE CONSTRUCTION COMPANY, A CORPORATION, AND A. TEICHERT & SON, INC., A CORPORATION

DEFENDANTS IN INTERVENTION.

No. Civ. S-2609

MEMORANDUM RE PROPOSED DECISION

RAYMOND R. SULLIVAN and JAMES T. MARSH, plaintiffs herein, brought this environmental lawsuit to halt further construction of three proposed interlocking portions of the federal interstate highway system, Route 5 (hereinafter referred to as the Freeway). Basically, plaintiffs sought declaratory relief and an injunction prohibiting defendants from continuing to grant further approvals or to authorize or permit further expenditures of federal and state monies in connection with the Freeway, and an injunction prohibiting further construction of the Freeway until

and unless defendants comply with applicable federal[6] and state statutes[7] relating to environmental quality, and applicable statutes relating to public hearing requirements.[8]

Jurisdiction was invoked on several grounds: 28 U.S.C. Section 1343(3) and (4); 28 U.S.C. Section 1361; 28 U.S.C. Section 1331(a); and Section 10 of the Administrative Procedure Act, 5 U.S.C. Sections 701–706.

Plaintiff City of Sacramento (hereinafter referred to as the City) sought, and was granted, leave to intervene in the instant action. The complaint of the plaintiff City differed from that of the individual plaintiffs insofar as the City did not request an injunction prohibiting further construction of the Freeway.

The matter came on for hearing on December 15, 19, 20 and 21, 1972, on plaintiffs' motion for a preliminary injunction, filed pursuant to Rule 65 of the Federal Rules of Civil Procedure. Having studied the briefs, affidavits and exhibits submitted by counsel prior to the aforesaid hearing, having heard the testimony offered and the arguments of counsel made at the aforesaid hearing, and having studied the authorities cited by counsel, the Court has concluded: (1) that all of the plaintiffs are barred from relief in this action by reason of laches and unreasonable delay, and (2) that defendants have complied with NEPA by virtue of compliance with Section 11 of the guidelines issued by the President's Council on En-

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[6] The National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321–4347.

[7] The California Environmental Quality Act of 1970, Calif. Pub. Res. Code Sections 21000–21151.

[8] Section 128(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. Section 128(a).

vironmental Quality (36 Fed. Reg. p. 7724) and Section 4 of the Federal Highway Administration's Interim Guidelines,[9] issued on November 24, 1970.

Counsel for the State and Federal defendants are directed to prepare findings of fact, conclusions of law, and a judgment in accordance with this memorandum.

DATED: January 29, 1973.

PHILIP C. WILKINS,
United States District Judge.

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[9] Section 4 of the interim guidelines has since been finalized, PPM 90-1 (23 C.F.R. Pt. I App. A, 1970).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF COLUMBIA

RAYMOND R. SULLIVAN, ET AL., PLAINTIFFS

v.

JOHN A. VOLPE, ET AL., DEFENDANTS.

CITY OF SACRAMENTO, A MUNICIPAL CORPORATION, PLAINTIFF IN INTERVENTION

GRANITE CONSTRUCTION COMPANY, A CORPORATION, AND A. TEICHERT & SON, INC., A CORPORATION

DEFENDANTS IN INTERVENTION.

Civil No. S-2609

FINDINGS OF FACT AND CONCLUSIONS OF LAW, FEB. 14, 1973

The above-entitled cause came on regularly for hearing on December 14, 1972, in the courtroom of the Honorable Philip C. Wilkins, United States District Judge. Plaintiffs appeared by and through their attorney Angus G. MacDonell, Esq. Plaintiff in Intervention appeared by and through its attorney James P. Jackson, City Attorney, by Richard H. Hyde and G. Richard Brown, Deputy City Attorneys. Defendants John A. Volpe, Sheridan E. Farin, and Donald Trull appeared by and through their attorney Dwayne Keyes, United States Attorney, by Richard W. Nichols, Assistant United States Attorney. Defendants California Department of Public Works, James A. Moe, and Robert Datel appeared by and through

their attorney Harry S. Fenton, Chief Counsel of the California Department of Public Works, by Elias D. Bardis and Daniel E. Wilcoxen, Attorneys for the California Department of Public Works. Defendant in Intervention Granite Construction Company, a corporation, appeared by and through its attorneys Grunsky, Pybrum, Skemp & Ebey, by Elmer Pybrum, Esq. Defendant A. Teichert & Son, Inc., a corporation, appeared by and through its attorneys McDonough, Holland, Schwartz, Allen & Wahrhaftig, by V. Barlow Goff, Esq., and Richard E. Brandt, Esq. Trial of the matter continued from December 14, 1972, through December 21, 1972. Evidence, by way of testimony, affidavits, documents, photographs, and other exhibits, was introduced. The matter having been argued by the parties, and the Court having taken the matter under submission for decision, and the Court being fully apprised in the premises, and good cause appearing therefor, the Court does now hereby make the following:

FINDINGS OF FACT

1. Interstate Highway 5 is part of the National System of Interstate and Defense Highways System, in which the United States of America is participating by supplying 90 percent of the cost of said highway. The terminals of Interstate 5 are the Canadian and Mexican borders. Interstate 5, which is 1,382 miles long, passes through the states of Washington, Oregon and California of which 797 miles is located in the State of California. All but 40 miles of Interstate 5 in California is completed except for minor alterations from Redding north to Oregon.

2. Plaintiff Raymond R. Sullivan resides at 3631 East Lincoln Way, Sacramento, California. This residence is approximately three-quarters of a mile

from the nearest point at which the Interstate 5 passes. Said residence is located within 1,000 feet of Freeport Boulevard, a main thoroughfare and State highway passing through the southern portion of the City of Sacramento. Land Park Drive, another main thoroughfare passing through the southern portion of the City of Sacramento, is located approximately halfway between Sullivan's residence and the Interstate 5 construction involved in this case.

3. Plaintiff James T. Marsh resides at 1109 Silver Lake Drive, Sacramento, California. This residence is approximately 600 feet from the nearest Interstate 5 construction involved in this case. Plaintiff Marsh has lived in said house since March 1964, and purchased it in January 1970. During all of the time he lived in said house, Marsh knew of the plans for the proposed routing of Interstate 5, as more specifically described hereinafter in these findings.

4. Plaintiff in Intervention City of Sacramento is a municipal corporation through which a portion of the Interstate 5 will pass. Said plaintiff in intervention has taken no steps to control land usage in areas abutting and adjoining the proposed freeway, since the routing of said freeway was adopted.

5. Defendant John A. Volpe is the Secretary of Transportation of the United States of America, and has the overall authority and responsibility for approval and supervision of programs conducted by the Federal Highway Administration (hereinafter referred to as FHWA), an agency within the Department of Transportation. Defendant Sheridan A. Farin is the Administrator for Region 9 of the FHWA, and is responsible for approval and supervision of programs conducted by FHWA within said Region, within which the instant construction of Interstate 5 is pending. Defendant Donald E. Trull is the Division

Engineer of the FHWA in the State of California, and is responsible for approval of federal-aid highway programs within the State of California, including portions of the interstate highway system in California. Said defendants are hereinafter referred to collectively as the "federal defendants".

6. Defendant California Department of Public Works is an agency of the State of California, authorized and directed to provide for the construction of all State highways, including those which are part of the interstate system of federal-aid highways, on locations designated by the California Highway Commission. Defendant James A. Moe is the Director of the California Department of Public Works, and is charged with the overall control and supervision of the activities of said Department. Defendant Robert Datel is the State Highway Engineer and Chief of the Division of Highways, a subagency within the Department of Public Works, and said defendant is charged with the overall control and supervision of the activities of said Division. Said defendants are hereinafter referred to collectively as the "state defendants".

7. Defendant in Intervention Granite Construction Company, a corporation, is a corporation which has contracted with defendant California Department of Public Works for the construction of the Segment A - Granite portion of Interstate 5, as more specifically hereinafter described. Said construction is presently proceeding. Defendant in Intervention A. Teichert & Son, Inc., a corporation, is a corporation which has contracted with defendant California Department of Public Works for the construction of the Segment A - Teichert portion of Interstate 5, as more specifically hereinafter described. Said construction is presently proceeding.

8. The portions of Interstate 5 at issue in this case are as follows: Broadway (Vallejo Way) south to 43rd Avenue (described herein as "Segment A - Granite"), 43rd Avenue south to Pocket Road (described herein as "Segment A - Teichert"), Pocket Road south to Beach Lake (described herein as "Segment B"), and Beach Lake south to Lambert Road (described herein as "Segment C"). Construction has already commenced on Segment A - Granite, and on Segment A - Teichert. There has been location and design approval as to Segments B and C, and bids are to be advertised as to said segments shortly.

9. Interstate 5 (as located in the City and County of Sacramento) was initially planned in the mid-1950s. The State of California, the County of Sacramento, and the City of Sacramento, jointly and individually, studied the various route alternatives of Interstate 5 as it was to pass through Sacramento County. The proposed routing of Interstate 5, as it is presently under construction, was known to and incorporated by the City of Sacramento in its 1958 general plan.

10. Public hearings were held by the California Highway Commission in connection with the adoption of the present route of Interstate 5. On April 21, 1960, a public hearing was held by said Commission involving route location of Segment C and most of Segment B of Interstate 5. The said route location was adopted, after said hearing, on April 13, 1961. On January 30, 1962, and again on May 17, 1962, public hearings were held involving route location of the remaining portion of Segment B, and all of Segment A. The said route location was adopted by the Commission, after said hearings, on June 26, 1962. These hearings were well attended by the public and received a great deal of exposure in the local

newspapers. Interstate 5 in Sacramento County was, in general, a *cause celebre* during the 1960s, with much public discussion.

11. The FHWA granted location approval of Segment C and most of Segment B on May 9, 1961, and granted location approval of the remainder of Segment B and all of Segment A on June 29, 1962. FHWA granted basic design approval of Segment C and most of Segment B on September 20, 1961, and granted basic design approval of the remainder of Segment B and all of Segment A on August 16, 1962. Subsequent minor revisions of said design approvals occurred thereafter, the last of which occurred on July 30, 1968.

12. The State of California entered into freeway agreements with the County of Sacramento on October 9, 1961, and with the City of Sacramento on June 13, 1963. Said agreements, in accordance with state law, detailed such basic design features as rearrangement of local roads and streets and location of interchanges. These freeway agreements were subsequently modified, the final modification having occurred on September 8, 1969.

13. The State of California received authorization from FHWA to procure right-of-way, and the right-of-way acquisition program was funded for Segment A during the fiscal year 1962–1963. The right-of-way acquisition program was funded for Segments B and C during the fiscal year 1963–1964. The State of Califoria has acquired title to all the right-of-way involved in the construction of these portions of Interstate 5, by acquiring 361 parcels directly from the property owners and instituting condemnation proceedings on the remaining 28 parcels. The State of California has expended $12,347,195.00 on right-of-way acquisition, and has removed the improvements

that existed on the right-of-way. The State of California has also displaced approximately 500 persons in connection with said right-of-way acquisition.

14. Since the right-of-way acquisition authorization, the State of California has been involved in utility relocation in connection with and preparation for the construction of those portions of Interstate 5 involved in this action. This relocation has involved gas, telephone, power, drainage, sewer and water lines. The sum of $1,405,196.58 has been expended by the State of California on such relocation, involving 41 various utility agreements. The remaining utility relocation will cost the State of California an estimated $153,110.21.

15. The community of Sacramento has developed on the basis of the proposed routing of Interstate 5. City and County general development plans and other area general development plans have been predicated on the construction of Interstate 5. Subdivisions have developed adjacent to the proposed right-of-way line. Streets, sewers, water mains, and power facilities have been planned and constructed on the assumption that Interstate 5 would be constructed as planned.

16. In their planning relating to the construction of Interstate 5, the state and federal defendants have taken into consideration, among other things and without limitation by the following list, factors involving the effect of Interstate 5 upon flora and fauna, archeological studies, aesthetic considerations, noise control, air pollution control, preservation of community integrity and street continuity, utility planning and design, recreational improvements, levee control, and community dependence upon the planned freeway over a substantial period of time. In these considerations the state and federal defendants have been

abundantly cautious to preserve environmental considerations to the maximum practicable extent.

17. NEPA became effective on January 1, 1970. Section 102(2)(C) of NEPA directed that there be prepared in connection with major federal actions significantly affecting the quality of the human environment a detailed statement by the responsible official, relating to the environmental impact of the proposed action, unavoidable adverse environmental effects therefrom, alternatives thereto, short-term and long-term goals, and irreversible commitments of resources. Provision was made in said section for appropriate consultation. Pursuant to NEPA, the Council on Environmental Quality (hereinafter referred to as CEQ) promulgated interim guidelines on April 30, 1970. Said guidelines were finalized on April 23, 1971, and published at Volume 36, Page 7724 of the Federal Register. Section 11 of said final guidelines provides as follows:

> "11. *Application of section 102(2)(C) procedure to existing projects and programs.* To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program."

18. Pursuant to the directives of NEPA and the CEQ, the FHWA issued its interim guidelines on

November 24, 1970. Provision was made in section 4 thereof for the reassessment of ongoing projects which were on new location. Said FHWA interim guidelines provided that "The State highway department (SHD) shall evaluate the environmental consequences of all . . . Federal-aid . . . planning, research and demonstration projects . . . ." Said guidelines further provide that:

> "The SHD's reassessment, which shall be done in consultation with the [FHWA] division engineer, shall be made to determine if such projects were developed in such a manner as to minimize adverse environmental consequences. Such projects, *to the extent practicable*, should be modified to incorporate additional elements of features identified and considered prudent to minimize harm. No environmental statement need be submitted, however, unless requested by the division engineer." (emphasis in original).

The FHWA interim guidelines have subsequently been finalized, without substantive change in this area, in the FHWA's Policy and Procedure Memorandum (PPM) 90–1.

19. Pursuant to the provisions of § 11 of the CEQ guidelines, and § 4 of the FHWA interim guidelines, officials of the FHWA and defendant California Department of Public Works, Division of Highways, met together in Marysville, California, on February 17, 1971, to reassess the planning and development involved in the proposed construction of Interstate 5. At said time, the state and federal defendants concluded, in consultation with each other, that the Interstate 5 project had been developed in such a manner as to minimize adverse environmental consequences. Accordingly, they concluded that an environmental impact statement, such as described in Sec-

tion 102(2)(C) of NEPA, was not required. There are 135 major highway projects planned in this District of the Division of Highways. Federal and state defendants determined that 133 of these projects would be processed with environmental impact statements. Because of the advanced stage of the other two projects, it was determined that it was impractical to alter their basic course of action and they were processed by environmental fact sheets. This Interstate 5 project was one of the two such projects.

20. Subsequent to said reassessment, the California Division of Highways submitted an "environmental fact sheet" dated March 10, 1971, relating to Segment A, to the FHWA. Said environmental fact sheet contained a detailed discussion of some but not all of the factors considered by the state and federal defendants in their reassessment. Said fact sheet was not required under the procedure set forth in § 11 of the CEQ guidelines and § 4 of the FHWA interim guidelines. The cover letter to said fact sheet recited that an environmental impact statement as to said portion of Interstate 5 would not be prepared. Said fact sheet was approved by defendant Trull of the FHWA on April 30, 1971. On May 25, 1971, the California Division of Highways submitted an "environmental fact sheet" of said date relating to Segments B and C of Interstate 5, to the FHWA. Said environmental fact sheet contained a detailed discussion of some but not all of the factors considered by the state and federal defendants in their reassessment. Said fact sheet was not required under the procedure set forth in § 11 of the CEQ guidelines and § 4 of the FHWA interim guidelines. The cover letter to said fact sheet recited that an environmental impact statement would not be prepared. Said fact sheet was approved by defendant Trull of the FHWA on June 14, 1971.

21. On May 30, 1972, the California Division of Highways was authorized to advertise, and did advertise, for receipt of bids for construction of a portion of Segment A. Bids as to said segment were opened on July 26, 1972, and the FHWA concurred in the award of the contract for construction of said segment to Granite Construction Company on August 9, 1972, in the sum of $12,180,302.00. Said contract was awarded to Granite Construction Company on August 15, 1972. On-site work under said contract actually started on September 15, 1972, although considerable preparatory work on said project had been undertaken by Granite prior to the on-site work. The advertising of this construction project was covered by the local newspapers. On May 31, 1972, both the Sacramento Bee and the Sacramento Union contained articles indicating that the state and federal defendants were presently advertising this project for construction. The Sacramento Bee carried notices of advertising on July 12 and July 19, 1972. The Sacramento Union announced the bid opening on July 27, 1972.

22. On June 28, 1972, the California Division of Highways was authorized to advertise, and did advertise, for receipt of bids for construction of the other portion Segment A. Bids as to said segment were opened on September 6, 1972, and on September 27, 1972, the FHWA concurred in the award of the contract for construction of said segment to A. Teichert & Son, Inc., in the sum of $6,343,748.00. Said contract was awarded to A. Teichert & Son, Inc., and on-site work under said contract actually started on October 2, 1972, although considerable preparatory work on said project had been undertaken by Teichert prior to the on-site work. The advertising of this construction project was covered by the local newspapers. On July 26, 1972, the Sacramento Bee and on July 27,

1972, the Sacramento Union contained articles indicating that the state and federal defendants were presently advertising this project for construction. The Sacramento Union carried notice of advertising on August 23 and August 30, 1972. The Sacramento Union announced the bid opening on September 8, 1972.

23. As of December 19, 1972, construction under the Granite contract was approximately 12 percent completed, and Granite had earned for work completed approximately $1,600,000.00. Granite is employing sixty-eight (68) employees on said job, with an average weekly payroll of $28,000.00. Granite has forty-six (46) pieces of major equipment on the job site, with an aggregate value of $1,800,500.00, and a monthly rental value of $88,900.00. Granite has negotiated twenty-five (25) subcontracts with an aggregate price of $4,440,000.00, and those subcontractors employ eighty-six (86) employees with a weekly payroll of approximately $34,400.00. Those subcontractors have seventy-five (75) pieces of major equipment on the job site, with an aggregate value of $1,500,000.00, and a monthly rental value of $96,000.00. Granite has thirteen (13) outstanding purchase orders in connection with said project, with an aggregate price of $1,012,000.00. An injunction prohibiting Granite from continuing with its work in performance of said contract would cause a monthly loss to the community and to Granite Construction Company of not less than $448,600.00 as follows: (a) $233,000.00 lost wages from employee lay-offs, (b) $88,900.00 loss of use of equipment of Granite, (c) $62,500.00 administrative costs in connection with the job, (d) $24,200.00 for erosion control, street maintenance, drainage maintenance and public safety, and (e) $40,000.00 loss of profits. Additionally, Granite would be faced with problems result-

ing from its existing purchase orders ($1,012,000.00), tied-up bonding capacity ($12,000,000.00), delays in completion of the work causing costs to increase, recruitment of new personnel upon resumption of work, repair of deterioration occurring during the delay, and inconvenience to the public by reason of the necessity for reduced speeds through the project site.

24. As of December 20, 1972, construction under the Tiechert contract was approximately 5 percent completed and Teichert had earned for work completed approximately $300,000.00. There are approximately one hundred (100) workmen employed on the Teichert job, with an average monthly payroll of $150,000.00. Construction of the Gloria Drive sewer line is approximately 50 percent completed, clearing on the project is 100 percent completed, and fencing is 25 percent completed. An injunction prohibiting Teichert from continuing with its work in performance of said contract would cause a loss to Teichert and to the community as follows: (a) $87,000.00 under agreement for sale of imported borrow, which must be removed on or before August 15, 1973, (b) purchase orders for materials on the project in the sum of $480,000.00, (c) twelve subcontracts in the aggregate sum of $1,726,428.00, (d) increase in job overhead presently estimated at $8,000.00 per month and general overhead attributable to the project presently estimated at $15,000.00 per month, (e) move-in and move-out costs, and (f) other costs of a general nature similar to those described as accruing to Granite in paragraph 23 of these findings of fact. Teichert has incurred costs of $3,500,000.00, or more than half of the total contract price.

25. The State of California has incurred costs of and expended, the sum of approximately $19,500,000.00 to date on these portions of Interstate 5, as

follows: (a) $3,500,000.00 for engineering, (b) $12,000,000.00 for right-of-way, (c) $1,500,000.00 for utility relocation, and (d) $2,500,000.00 to the contractors.

26. The environmental fact sheets described in paragraph 20 of these findings of fact are public documents, and are available to the public on request. They were in fact referred to at a public hearing conducted by the County of Sacramento in February 1972 concerning the proposed addition of an interchange on this project. State officials also testified at said hearing that an environmental impact statement was not prepared on this project, and that the project was proceeding under the environmental fact sheets.

27. Plaintiffs Sullivan and Marsh were aware of the proposed construction of Interstate 5 for several years prior to the start of actual construction. They undertook no investigation to determine if an environmental impact statement had been prepared, although they are both intelligent individuals capable of ascertaining this fact with a minimum of effort. Plaintiff Sullivan contacted the Environmental Defense Fund concerning this project in early July 1972, prior to the award of the Granite and Teichert contracts, but this suit was not brought until November 2, 1972, after substantial construction had already occurred and the right-of-way had been substantially cleared in Segments A - Granite and A - Teichert.

28. Plaintiff in Intervention City of Sacramento is charged with knowledge of the provisions of NEPA, the CEQ guidelines, and the FHWA guidelines, as they apply to ongoing projects. The City of Sacramento could not reasonably rely upon the assumption that the construction of these portions of Interstate 5 would be processed with an environmental impact

statement, and the City was under a duty to ascertain the true facts, a duty it failed to perform.

29. Plaintiffs allege various factors that were not adequately considered by the federal and state defendants in the development of this project. Among the factors alleged are air pollution, lack of consideration for land use plans, disruption of municipal services, noise pollution, depletion of land in urban areas and trees, aesthetics, and ecological spectrum of streams, marshlands and other areas along the route. Plaintiff offered little evidence at the trial of this action of the above factors, with the exception of noise pollution. Federal and state defendants testified to each of the above factors, indicating extensive investigation and research into each of the factors and established to the satisfaction of the Court that these factors were, indeed, considered by federal and state defendants in the development of this project.

With respect to sound pollution, state and federal defendants conducted extensive studies and investigation concerning this problem, and as part of this project are providing sound barriers in order to protect development that existed at the time of route adoption. These barriers will cost $700,000.00, and are consistent with, or exceed, existing state and federal standards relating to sound impact.

And from the foregoing Findings of Fact the Court does hereby make the following:

CONCLUSIONS OF LAW

1. Plaintiffs Raymond R. Sullivan and James T. Marsh are barred from any relief in this action by reason of laches and unreasonable delay, in that they failed to bring this action, seeking injunctive relief, until November 2, 1972, although they had actual

knowledge of the planned construction of this portion of Interstate 5 for a substantial period of time prior to said date. By reason of their delay, defendants and defendants in intervention would be unjustly harmed by the issuance of an injunction in this action.

2. Plaintiffs in intervention City of Sacramento is barred from any relief in this action by reason of laches and unreasonable delay, in that it failed to bring this action until December 11, 1972, although it had constructive knowledge of the planned construction of this portion of Interstate 5 without the issuance of an environmental impact statement since April 30, 1971 (as to Segment A) and since June 14, 1971 (as to that portion of Segment B located within the City of Sacramento).

3. All members of plaintiffs' purported class are barred from relief in this cause for the same reasons that plaintiffs Sullivan and Marsh are so barred. To the extent that there may be persons not so barred, they are not members of a class of persons of whom plaintiffs are typical, and are therefore not members of the class of persons purported to be represented by plaintiffs.

4. The state and federal defendants acted, with respect to the portions of Interstate 5 involved in this action, in full compliance with the requirements imposed upon them by NEPA, Section 11 of the CEQ guidelines, and Section 4 of the FHWA interim guidelines. Said guidelines give proper effect to the provisions of NEPA as to ongoing projects, as applied to the facts of this case. Accordingly, plaintiffs, members of their purported class, and plaintiff in intervention, are all precluded from relief.

5. The state and federal defendants did not abuse their discretion in determining that it was not prac-

ticable to alter the basic course of action of the portions of Interstate 5 involved in this action. In this connection the state and federal defendants could properly have concluded, and this Court concludes, that (a) there has been massive participation of the local community in the planning of this project, (b) the state and federal defendants have been extremely sensitive to the impact this project will have on the environment and have taken environmental factors into account in their planning of this project, (c) the likelihood of harm to the environment from this project is minimal, especially in contrast to the present status of cleared right-of-way and partially completed construction, and also in consideration of the heavy reliance of the Sacramento community in planning the development of said community upon the proposed freeway, (d) the cost to the state and federal defendants, and to the defendants in intervention, of halting construction while an environmental impact statement is prepared is immense, and (e) that to the extent practicable, this project was modified to incorporate additional features to minimize its impact.

By reason of each of the foregoing Findings of Fact and Conclusions of Law, plaintiffs and plaintiff in intervention are not entitled to a preliminary injunction, a permanent injunction, or any other relief as prayed for in the complaint. Let judgment be entered in favor of defendants and defendants in intervention accordingly.

Dated this ——— day of ———, 1973.

———— ————,

United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1973